JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 85/90

COR: THE HON. MR. JUSTICE CAREY J.A.
THE HON. MR. JUSTICE GORDON J.A.
THE HON. MR. JUSTICE PATTERSON J.A. (AG.)

BETWEEN	RADCLIFFE BUTLER	PLAINTIFF/APPELLANT
A N D	NORMA BUTLER	DEFENDANT/RESPONDENT

D A Scharschmidt Q C for appellant

Enos Grant for respondent

May 4, 5, 6, 7 & June 7, 8
28, 1993

CAREY J. A.

The parties were at one time husband and wife. While they were married they formed a company Norcliffe Ltd. as a family cum service company, which, when incorporated, had a share capital of $100 divided into 100 shares at $1 each. Each owned a moiety of the share capital which was fully paid up. For all practical purposes, the husband acted as the managing director, while the wife held the other directorship and acted as the company secretary. These were all informal arrangements because no meetings were ever held. The main asset of the company was the matrimonial home situate at 32 Upper Melwood Avenue in St. Andrew. The marriage, alas, ended in divorce: the wife sought to put an end to this quasi partnership.

She filed a petition under sections 196 and/or 203 of the Companies Act. I would note en passant, that at the hearing counsel for the wife intimated that they were confining the proceedings under section 196. The material allegations against the husband which were contained in paragraphs 11 and 12 of the petition thereof, were as follows:

"11. That the Respondent usurped the management of the Company and has been using the funds and/or the said property of the Company as security to raise funds for his own personal use and benefit and/or to promote his own personal business interest and/or to acquire shares and/or property in his own name rather than in the name of the Company, in particular:-

(a) Shares in KONG'S COLOUR LAB LIMITED;

(b) Shares in CARIB OCHO RIOS APARTMENTS LIMITED; and

(c) The Purchase of APARTMENTS at Caribbean Village, Salem in the parish of Saint Ann and OXFORD MANOR, Oxford Road in the parish of Saint Andrew.

That on the other hand, he has been neglecting to pay the just debts of the Company.

12. That the Respondent has refused to account for any of his actions. No meeting has been held; no dividends have been declared."

The reliefs for which she prayed were as follows:

(1) A declaration that the Respondent is in breach of his fiduciary duties to the Company.

(2) A declaration that the Respondent is trustee for the Company of the said shares in Kong's Colour Lab Limited and Carib Ocho Rios Apartments Limited, the said Apartments and/or all the monies that he has received from the use of the Company's property and/or funds to finance his several personal investments and/or the profits made therefrom.

(3) An account of what is due from the Respondent in respect of all monies, profits or gains, which would have been realised by the Company but for the wilful default and/or neglect by the Respondent and/or the breach of the fiduciary duty owed by the Respondent to the Company.

(4) An Order for payment by the Respondent to the Company of any such monies received by the Respondent and/or any sum found due upon the taking of such account with interest thereon at 14% or at such other rate as may seem just.

(5) An Order that the Respondent is personally liable for all debts that he has incurred in the name of the Company to further his personal interest and that he takes immediate steps to realise and/or indemnify the Company from any liability whatsoever therefor.

(6) That your Petitioner purchase the Respondent's said Shares in the Company at a fair value alternatively, that the Respondent purchase your Petitioner's Shares at a fair value.

(7) For such further or other relief as to this Honourable Court may seem just.

Chester Orr J., after a hearing which meandered over some two years between 1986 and 1988, finally delivered his judgment on 31st July 1990 essentially in terms of the prayer. In this way, what I could term as this quasi-partnership which had been given a **corporate** patina was given its quietus.

This appeal is against his orders and judgment.

A number of grounds of appeal were settled and filed but Mr. Scharschmidt Q.C. put his submissions on two broad bases. First, he urged that even if the matters alleged in paragraphs 11 and 12 of the petition (which have been set out earlier in this judgment) were proved, they did not constitute oppressive conduct within the meaning of section 196 of the Companies Act. As an alternative to the first argument, he submitted that the allegations had not been proven. The second broad base on which he rested his submissions was that the orders made by Chester Orr J were not permissible under section 196 of the Companies Act.

The learned judge under a sub-head of his judgment "Findings" stated as follows at p. 104:

> " Although the petitioner entrusted the management of the company to the respondent, she did not thereby divest herself of her rights and interest as a shareholder in the company."

He ended with this omnibus statement at p. 106:

> " I find that the affairs of the company are being conducted in a manner oppressive to the petitioner, a member of the company."

The reasoning in his judgment cannot be criticised because it is in keeping with the manner in which the issues were placed before him. Like Caesar's Gaul they were divided into three parts. The first issue related to the ownership of shares. That is no longer a live issue before us, nor do I think it really arose on the wife's petition. The second issue related to the allegation made by the wife that the husband had usurped the management of the company. Having regard to the submissions made by Mr. Scharschmidt Q.C. before us, this remained a very live issue. The third issue related to which of the parties held the beneficial interest in the company's asset, viz. the matrimonial home. I incline to think that this too was not really a live issue before Chester Orr J. The impression which I formed was that, the debate below proceeded as if a dispute in relation to matrimonial property under the Married Women's Property Act, which may well explain the reason for the protracted delay in bringing this uncomplicated litigation to finality.

Be that as it may, as a convenient starting point for dealing with the arguments strenuously pressed upon us by Mr. Scharschmidt Q.C., I desire to identify first the allegaitons which were made against the husband by the wife in her petition under section 196 of the Companies Act and see whether they were proved. Next, I propose to consider what constitutes oppressive conduct and then deal with the

question, whether the proven allegations do amount to such conduct in point of law. Finally, I will consider his submissions on the validity of the orders of Chester Orr J.

The effect of the learned judge's findings was that the petitioner had proved the allegations in paragraphs 11 and 12. As to the former paragraph, it contained the following specific allegations:

> (i) the husband usurped the management of the company;
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> (ii) he used the funds or property of the company as security -
>
> (a) to raise funds for his personal use and benefit;
>
> (b) to promote his own personal business interest;
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> (c) to acquire shares or property in his own name rather than in the name of the company;
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> (iii) he neglected to pay the company's debts.

With respect to the latter paragraph, the allegations were that:

> (iv) he refused to account for his actions;
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> (v) he held no meetings;
>
> (vi) no dividends have been declared.

As required, these allegations were verified in the wife's affidavit in support of her petition. The husband admitted in paragraph 32 of his affidavit that he had "run the company as (his) own for (his) personal use and benefit." He denied allegation (i) as to usurpation of the management of the company by starkly asserting his pre-eminent status as managing director. That really said it all. It is true to say that nothing in the husband's affidavit really controverted the wife's allegations. He not only believed, but expressed his view that the company was formed for his personal use and benefit. In a word, the company and himself were one entity.

The learned judge found that the company was formed as a family company "in view of the harmonious marital relationship then existing." The judge, I venture to think was not unmindful of the joinder of parts of the christian names of each of the parties in the company name, when he came to this view. At all events, this finding was not challenged in any way by Mr. Scharschmidt. At the heart of his submissions that the allegations of the wife were not proved, was his view that the oppressive conduct must continue up to the time of the presentation of the petition and that therefore isolated acts of oppression were not within the provision.

The short answer to this approach, is this. Seeing that none of the allegations whether of usurpation or expropriating of funds or property for the husband's use had been put right, the argument must be quite unfounded. But in deference to this argument advanced before us, it should be said that under the United Kingdom provision (section 210), it is quite correct that the Court requires proof of oppressive conduct over a period of time up to the time of the petition if it is to make a winding up order. Re Jermyn Street Turkish Baths Ltd. (1971) 1 W.L.R. 1042. The situation in this jurisdiction however, is quite different because section 196 (6) does not limit oppression to a series of acts continuing up to the petition. It provides as follows:

> "(6) For the purposes of this section the word "oppressive" shall include any instance of oppression whether constituted by a single act or by a course of conduct."

There is no equivalent provision in the United Kingdom Legislation. It would seem to me that there would be no necessity for a rule requiring the acts to continue up to petition. Re Jermyn Street Turkish Baths Ltd. (supra) cannot then assist Mr. Scharschmidt in his submissions on this point. In the result, I cannot accept, as was argued, that the

allegations made by the wife against the husband, were not proved.

I pass now to consider as a matter of law, what is "oppressive conduct" within the meaning of section 196 of the Companies Act. Section 196 (1) and (2) which are material for the purposes of this appeal, are in this wise:

> "196.—(1) An application to the Court may be made by petition for an order under this section either—
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> (a) by any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself); or
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> (b) by the Minister, in any case where it appears to him from any such report as is mentioned in section 161 that the affairs of the company are being conducted in a manner oppressive to some part of the members.
>
> (2) If on any such petition the Court is of opinion that the company's affairs are being conducted as aforesaid, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the reduction accordingly of the company's capital, or otherwise."

This provision (section 196) which operates as an exception to the rule in **Foss v. Harbottle** [1843] 2 Hare 461 entitles a member of a company to bring proceedings claiming that the affairs of the company are being conducted in a manner oppressive to some part of the membership including himself. This Court in **Aaberg v. Pedersen** [1975] 13 J.L.R. 155 at pp. 166 - 167 adopted and approved a dictum of **Buckley** L.J. in **Jermyn Street Turkish Baths Ltd.** (supra) at p. 199 where the learned Lord Justice said:

> "What does the word 'oppressive' mean in this context? In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simmonds in Scottish Co-operative Wholesale Society Ltd. v. Meyer [1958] 3 All E.R. 66 at 71, [1959] A.C. 324 at 342 'burdensome, harsh and wrongful' to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see Scottish Co-operative Wholesale Society Ltd. v. Meyer and Re H R Harmer Ltd. [1959] W.L.R. 62. We do not say that is necessarily a comprehensive definition of the meaning of the word 'oppressive' in s 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor."

The classical definition of what constitutes oppressive conduct is to be found in Scottish Co-operative Wholesale Society Ltd. v. Meyer & Anor. [1958] 2 All E.R. 66 where Viscount Simmonds stated it as the exercise of authority that was "burdensome, harsh and wrongful." That definition was not put forward as exhaustive however. Although these definitions are undoubtedly helpful, it must be borne in mind that section 210 of the Companies Act [1948] U.K. differs from our section 196. As I have previously stated, section 196 of our Act omits the requirement under section 210 (U.K.) that the circumstances of the case must justify a winding up order. Moreover, under section 196, a single act may amount to oppressive conduct; the U.K. provision requires a course of

conduct. I reiterate the view I earlier expressed that section 196 is wider in scope than section 210 **the Companies Act** [1948] (U.K.). By reason of these differences, I venture to suggest that any definition of oppressive conduct essayed under section 196 must necessarily and inevitably be more expansive and liberal rather than restrictive and narrow. In **Five Minute Car Wash Service Ltd.** [1966] 1 All E.R. 242, Buckley J, in relation to oppression under section 210, is quoted in the headnote as holding that:

> " In order to establish that a person conducting the affairs of a company was doing so oppressively within s 210 of the Companies Act, 1948, it must be shown at least that he was acting unfairly towards the person claiming to be oppressed;"...

That formulation has moved from the litmus test of the pejorative categorisation of burdensome, harsh and wrongful to that of at least, unfairness. Lord Keith speaking in the House of Lords in **Elder v. Elder & Watson Ltd.** [1952] S.C. 49 at p. 60, described oppressive conduct as involving at least an element of lack or probity or fair dealing. The current position in United Kingdom is to be found in section 75 of the Companies Act 1980 (U.K.) which is in the following form:

> "...s.75: '(1) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act of omission on its behalf) is or would be so prejudicial... (3) If the court is satisfied that a petition under this section is well founded it may make such order as it thinks fit for giving relief in respect of the matters complained of (4) Without prejudice to the generality of subsection (3) above, an order under this section may—... (d) provide for the purchase of the shares of any members' ..

This legislation was introduced to bring the law into consonance with those decisions of the courts which bore on the precursor of this provision, viz, section 210 of the Companies Act 1948 (U.K.).

In the light of this short exigesis I am of the view that oppressive conduct under section 196 is constituted where the conduct is at least unfair or prejudicial to the interests of the member or members on whose behalf the petition is presented. Without any such intervention by statute in this jurisdiction, I think there is good reason for saying that the suggested construction of section 196 respects its language which is wider and more flexible than the comparative United Kingdom provision. Coextensively with that construction, the orders which the court might make under that provision, are, I suggest, equally expansive.

This brings me to a consideration of Mr. Scharschmidt's alternative argument previously mentioned, which really involves the application of the definition I have ventured, to proven allegations. Mr. Enos Grant submitted that the acts alleged in paragraph 11 of the petition amounted to an expropriation of the company's property by the husband for the benefit of himself alone. The husband admitted that he ran the company for his personal benefit nor did he scruple to assert that the company was formed for his personal benefit. His conduct is not dissimilar to that in **re H.R. Harmer Ltd.** [1958] 3 All E. R. 689 where a father assumed powers he did not possess and exercised them against the wishes of other shareholders. Like the father in **re H.R. Harmer Ltd.** (supra), the husband forgot that he had created proprietary interests in a business, and that he could not ignore the legal entity thereby created and the concomitant shares therein. In that case, that autocratic conduct which was not in the company's interests, was held to be oppressive conduct under the more

restrictive provisions of section 210 of the Companies Act (U.K.). A fortiori whether the allegations in paragraph 11 amount to an expropriation of the company's property for personal use or to an autocratic exercise of powers wrongfully, it would seem to me to follow ineluctably that such conduct must be stigmatized as oppressive conduct i.e. unfair and wrongful under section 196 of the Companies Act.

In **Baird v. Lees** [1924] S.C. 83, similar allegations to those contained in paragraph 12 of the petition under the winding up provision of the United Kingdom 1908 statute, which allowed the Court to wind up a company if it were of opinion that it was just and equitable to do so, were held to enable the court to act in that way. Mr. Grant argued, and I think rightly, that if the court would order such draconian relief on such facts, then on similar facts, a court acting under section 196 would grant relief: the facts could not be regarded any less seriously. I believe that argument to be well founded and I agree with it entirely. Another case where the allegations were similar is **Loch v. John Blackwood Ltd.** [1924] A.C. 783 which is a decision of the Privy Council from Barbados under a provision similar to that in **Baird v. Lees** (supra).

I should add that the allegations contained in paragraph 12, when taken together with those in paragraph 11, fall well within the construction I have ventured of conduct that at least is unfair and prejudicial to the wife, the other member of the company.

There is one remaining point on this aspect of the appeal with which I must deal. Mr. Scharschmidt Q.C. submitted that a distinction must be drawn between matters which affect the company and matters which affect a member as a member. No one disputes that statement: section 196 (1) (a) expressly so states. Having regard to the allegations made in paragraph 11 and paragraph 12 of the petition, it is difficult to appreciate how these allegations could do otherwise

but affect the wife as the oppressed other member of the company. In this regard, the example given in Pennington's Company Law (3rd edition) p. 577 is where a member of a company has been treated harshly in some other capacity, for example, if he has been dismissed from his directorship or employment under the company: see **In re Westbourne Galleries** [1973] A.C. 360. Learned Queen's Counsel did not, as it seemed to me, think highly of this point because apart from referring us to what appears in a textbook, he did not in any way endeavour to show its relevance to the circumstances of the instant case. That diffidence in my view, was eminently justified: the point does not at all arise.

In his opening submissions, Mr. Scharschmidt Q.C. did urge that the orders made by the learned judge and which appear in the introductory part of this judgment, were impermissible because, in general, they were not:

> (i) orders for regulating the conduct of the company's affairs in future or
>
> (ii) for the purchase of the shares of any members.

But by the end of the day, he had accepted, if I understood his apparent volte face, that he was in error. He referred us to Gower's Principles of Modern Company Law (4th edition) at p. 665 where the learned editors explain the equivalent of section 196 (2) in this way:

> "...The order may regulate the conduct of the company's affairs in future, may order the purchase of shares of any members of the company by other members or by the company itself with a consequent reduction of capital or may otherwise bring to an end the matters complained of."...

It seems that this reference put paid to any argument that the orders made were impermissible under section 196. He did not seek to say that the orders would not put an end to the oppression complained of. There can be little doubt that

the phrase "or otherwise," greatly expands the range of orders which the court might make, short of winding up the company, in order to put an end to the "oppressive conduct." It may be that when our Companies Act was being revised, an effort was made to ensure that the provisions of section 196 were made less restrictive than the United Kingdom section 210 of the 1948 Companies Act. In the United Kingdom, the Cohen Committee had recommended changes in the law for that purpose but that really did not eventuate. In my opinion, our section 196, without the restrictions of section 210 (U.K.) enables the court to apply equitable considerations. I would adopt the words of Lord Wilberforce in **Re Westbourne Galleries** reported sub nom - **Ebrahimi v. Westbourne Galleries Ltd. & Ors.** [1973] A.C. 360 at p. 379 in relation to United Kingdom winding up provision viz. section 222 (f) of the Companies Act 1948.

> "(the section) enables the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

I suggest that they apply equally powerfully to section 196 of the Companies Act.

In the result, Chester Orr J came to the right conclusions and made orders which, in the light of equitable considerations as respects the husband and the wife, he was empowered to make. For these reasons I was of opinion that the orders should not be disturbed and the appeal dismissed as we announced at the completion of submissions on 8th June when we had promised that we would give our reasons later. This is in fulfillment of that promise.

GORDON J.A.

I agree entirely and have nothing to add.

PATTERSON J.A. (AG.)

I have had the advantage of reading in draft, the reasons of Carey J.A. for dismissing this appeal. Those reasons also accord with my views.